No. 48987-2-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

In re the Marriage of

TODD T. HARDIN
Respondent

and

KAREN E. LOFGREN
Appellant

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

REPLY BRIEF OF APPELLANT

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2. The constitution and Washington law and policy do indeed protect a parent's relationship with his or her child in ways pertinent here.

3. Washington law required a full and fair inquiry into all facts relevant to the children's best interests and to the allegations of harm and proposed limitations, an inquiry the court foreclosed.

4. Hardin bore the burden to prove a basis for limitations and a nexus between any basis and any limitations imposed.

5. The agreed parenting plan, which is not based on an independent judicial inquiry into the facts, should not preclude such an inquiry on modification.

6. An analysis under RCW 26.09.187 cannot substitute for the analysis required where a court imposes limitations.

7. The exclusion of the expert witness and the improper reappointment of the G.A.L. undermined the goal of a full and fair inquiry.

8. The court erred by placing the father in charge of whether the mother and children have contact, given his complete opposition.

9. The fee award has no basis in law or fact.

10. This appeal is not frivolous. No fee award is justified.

11. The case should be remanded for trial to a new judge.

II. ARGUMENT IN REPLY

A. INTRODUCTION AND FACTUAL CLARIFICATIONS.

Hardin misrepresents numerous facts. Lofgren will seek to address those of greatest consequence.

First, Hardin acknowledges the GAL issued an initial report in February 2013, before the criminal charges arose, "detailing the results of her investigation at that time," but he omits that in that report she concluded both parents demonstrated good parenting skills and recommended a 50/50 residential schedule, or in the alternative that Lofgren be the primary residential parent. CP 310. Also included in that report were the children's descriptions of their attachment to Lofgren. CP 293-301.

Hardin also points out that Lofgren's motion for discretionary review was denied, Br. Respondent at 4, but neglects to mention the denial has no effect on the appeal. RAP 2.3(c) (denial "does not affect" right of review). Rather, the commissioner simply ruled the issue did not meet the criteria for discretionary review under RAP 2.3(b).

At the heart of Lofgren's appeal lies the absence of a full and fair inquiry into the facts pertinent to entry of a parenting plan, precisely what this Court anticipated when it ruled "the lifetime orders barring Lofgren from all contact with her children were not reasonably necessary to protect

the children from harm." CP 400. Though other statutory bases might permit a no-contact order, this Court acknowledged, implicit is that such statutes would be complied with, meaning the necessary inquiry would occur. Because the trial court and Hardin refuse to look behind the agreed parenting plan entered during the pendency of the criminal appeal, that inquiry never occurred, as is evident from how Hardin misuses those findings in his statement of facts.

For example, Hardin points to the court's finding that there was abusive use of conflict that created a danger of serious damage to the children's psychological development, but offers no citations to the record in support of the finding other than an allusion to the criminal conviction. Br. Respondent, at 9. During the dissolution, both parties alleged abusive use of conflict against each other. See CP 317-337, 340-343, 288-313. Those allegations were not subjected to an actual fact-finding.

Similarly, Hardin asserts that the "record clearly demonstrates Karen poses a harm to the children," with no citations to the record or other elaboration of evidence in support of this alleged harm. Br. Respondent, at 11. Rather, he simply relies on Lofgren's agreement that her criminal conduct harmed the children. 1/11/16 RP 75-76 (Lofgren acknowledging, too, the harm arising from dissolution and separation). However, Hardin mischaracterizes her testimony as also admitting "the

continued danger of harm exists," without citation to the record. Br. Respondent, at 11. She made no such admission.

Here, again, the point remains that the trial this Court contemplated in its decision in the criminal case has never occurred.

Remarkably, Hardin tries to blame Lofgren for that error, though from the start he argued the court need look no further than the agreed parenting plan. See CP 43-49. Further, he claims Lofgren "offered no expert testimony that contact between her and the children is in the children's best interests from anyone other than herself." Br. Respondent, at 5. In fact, the court foreclosed such testimony when it denied a continuance after Lofgren's expert became unavailable just before trial due to a family crisis. Hardin's focus on this lack of evidence tacitly concedes its materiality and the prejudicial effect of the court's denial of the continuance to allow Lofgren to present such evidence.

Hardin also claims Lofgren failed to preserve her objection to the GAL's inadequate performance of her duties. Br. Respondent, at 30. In fact, the record is clear that Lofgren objected to the GAL's competence from the outset, CP 344 (January 26, 2012 motion to discharge GAL), challenging the adequacy of her investigation and asserting bias for interjecting her religious viewpoint into the GAL investigation. CP 345-351, 353, 375-76, 386. See Br. Appellant, at 9-10. Following the criminal

appeal, Lofgren again objected to the appointment of Kevetter as the GAL during the adequate cause hearing. CP 111-112.

On attorney fees, Hardin asserts that he was properly awarded fees involving preparation for the expert Lofgren decided "last minute" to "abandon." Br. Respondent, at 33. As discussed below, this is a complete mischaracterization of the facts. The expert became permanently unavailable right before trial due to a family emergency, not by any choice of Lofgren (or the expert). See § III.F.

B. CONSTITUTIONAL RIGHTS AND THE BEST INTERESTS OF CHILDREN.

Hardin dismisses the important interests at stake in this proceeding. Br. Respondent, at 8-9. He is wrong to do so for two reasons.

First, the sentencing court and then the family court deprived Lofgren of all contact with her children. The constitutional right vindicated in this Court's earlier decision was again abridged by the trial court. As this Court has elsewhere recognized, in dissolution proceedings "parents have a fundamental liberty interest in the 'care, custody and management of their children.'" *Underwood v. Underwood*, 181 Wn. App. 608, 612, 326 P.3d 793, 794 (2014) (citation omitted).

Likewise, our Supreme Court has recognized that the interests at stake in marital dissolution proceedings are "significant." *King v. King,* 162 Wn.2d 378, 394, 388, 174 P.3d 659 (2007). In *King,* the court

declared no right to appointed counsel applies in dissolution proceedings, as it does in terminations and dependencies, because "a decree of dissolution between parents does not sever either parent's rights and responsibilities over the children. The rights and responsibilities of the parents are not terminated but rather allocated." *King,* 167 Wn.2d at 394, 387. Moreover, the Supreme Court noted the Parenting Act includes various safeguards to protect against erroneous court decisions (*King,* 167 Wn.2d at 387), which this court likewise relied upon in the criminal proceeding. CP 40 (recognizing the "statutory procedures in place that protect a parent's right to procedural due process where the fundamental right to parent is at stake").

Here, the safeguards designed to protect Lofgren in the family law proceeding failed. By ignoring the applicable legal standards and evading the necessary fact-finding, the court transformed this proceeding into a de facto termination. The "significant" interests Lofgren enjoys, the constitutional rights this Court recognized in the earlier appeal, have been violated.

Moreover, Washington policy, reflected in its family law, likewise protects the parent-child relationship – for all parents and children, not only as a matter of right on the parents' part, but as a matter of the children's best interests. Specifically, the Parenting Act, chapter 26.09

RCW, "recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and that the relationship between the child and *each* parent should be fostered unless inconsistent with the child's best interests." RCW 26.09.002 (emphasis added). This policy does not discriminate *per se* against parents who are incarcerated, or against parents based on their crime of conviction. Rather, our policy operates from the premise that both parents are essential to the children's best interests. Here, as in *Underwood,* these policy directives cannot be ignored. 181 Wn. App. at 612.

Even where a parent's conduct requires some restrictions, the policy in support of the ongoing relationship remains, as compared to when the factual bases for termination are proved by clear and convincing evidence. *See, e.g., Matter of B.P. v. H.O.,* 186 Wn.2d 292, 312, 376 P.3d 350, 360 (2016) ("Before a court can terminate a parent's rights, the State must prove six statutory elements by clear, cogent, and convincing evidence"). The trial court effectively reached this result without coming close to satisfying this rigorous test, nor even those tests that apply under the Parenting Act, chapter 26.09 RCW.

That is, in the dissolution context, the court may and must allocate residential time between divorcing parents and may place limitations on a parent provided the statutory requirements of RCW 26.09.191 are met,

meaning some harm (not just "best interests") must be proved. But these decisions must be reached after a fair and full inquiry into those issues and must comply with the statute. The decision here fails both these requirements.

C. THE PROPER SCOPE OF THE PROCEEDING: A FULL INQUIRY INTO THE CHILDREN'S BEST INTERESTS AND INTO ANY BASIS FOR LIMITATIONS AND INTO THE NEXUS BETWEEN THAT BASIS AND LIMITATIONS.

Lofgren petitioned under RCW 26.09.260(5)(c), (7), and (9). These provisions are included in the appendix. They apply only to adjustments to the "residential aspects of a parenting plan" (§ 5) or to "residential time" (§§ 7 and 9). Under this section of the statute, the court "may order adjustments … upon a showing of a substantial change in circumstances of either parent" without the petitioning parent having to carry the "heavy burden" imposed for those seeking to change the child's primary residence. *In re Marriage of Pape,* 139 Wn.2d 694, 710, 989 P.2d 1120 (1999) (e.g., no need to prove a detrimental environment or that "the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child…"). Rather, what Lofgren needed to prove under the statute were these:

• Substantial change of circumstances, including as specifically related to the reason for limitations on residential time.

• A proposed plan not exceeding 90 overnights per year.

- Lack of reasonable visitation time.
- Best interests of the child.
- Completion of evaluations or treatment ordered.[1]

RCW 26.09.260(5)(c), (7), and (9). Thus, the statute describes the scope of the modification proceeding. "[A] court abuses its discretion if it fails to follow the statutory procedures." *In re Marriage of Watson,* 132 Wn. App. 222, 230, 130 P.3d 915, 918 (2006). Here, the trial court's findings on these issues are confusing and inadequate, as was the scope of the fact-finding itself.

The original parenting plan relies on the no-contact order as controlling all provisions of the residential schedule. CP 1-4. The trial court agreed that termination of this order constituted a substantial change of circumstances for an adjustment. CP 270. The court also found a substantial change of circumstances for adjusting the non-residential aspects of the parenting plan, by correcting one finding of limitation DV and adding another (impairment of ties, because Lofgren has been exiled from children). CP 269. The court found none of the reasons under § 5(c)

[1] No orders for evaluation or treatment were included in the original parenting plan, as the trial court correctly noted. CP 269. However, Lofgren had been evaluated during the criminal proceedings and was engaged in voluntary mental health counseling. Ex, 2, at 4-5; RP 50.

applied, thus ignoring the "reasonable visitation" and "best interests" analysis the statute includes. CP 268.

Confusing as this is, the actual exercise the court avoided is more straightforward. The record establishes the substantial change of circumstances: the no-contact order, driver of the original parenting plan, no longer exists. Plus, the parenting plan allows for review if the no-contact order is terminated. Lofgren's proposed plan does not exceed 90 days. She has zero residential time, which is *per se* unreasonable, particularly as it was justified in the original parenting plan entirely on the basis of the now terminated no-contact order. CP 3. *See, e.g., In re Marriage of Hoseth*, 115 Wn. App. 563, 574, 63 P.3d 164, 169 (2003) (earlier plan's visitation unreasonable where order prohibited).

What remains is the question of whether modification serves the children's best interests. The court seemed to think the limitations under RCW 26.09.191 answered this question, as Hardin argued. See CP 43-49, 268. They do not. A domestic violence finding mandates limitations on residential time (RCW 26.09.191(2)(a)), but this provision "does not give the trial court authority to *eliminate* residential time." *Underwood*, 181 Wn. App. at 611 (emphasis in original). The statute does not even mandate what kind of limitations are required, whether limitations on the amount of residential time, or on the manner of contact (e.g., supervised),

or on treatment requirements – but in all cases "tailored based on the individual circumstances." Horenstein, 20 *Wash. Prac., Fam. and Community Prop. L.* § 33:23.

In order to eliminate all residential time, the court must apply RCW 26.09.191(2)(m)(i), which requires an express finding "based on the evidence" that limitations "will not adequately protect the child from the harm or abuse that could result if the child has contact with the parent requesting residential time …" RCW 26.09.191(2)(m)(i). The court made no such finding, nor was there evidence to establish Lofgren would harm or abuse the children through contact with them. It is not enough that there was historical harm arising from the fact of conviction. Otherwise, the statute becomes nonsensical. A domestic violence finding would be the beginning and end of the inquiry. Likewise, there would have been no need for this Court to remand from the sentencing appeal.

Nor is a speculative harm enough, what Hardin calls "potential for harm." Br. Respondent, at 25. Certainly, speculation "about future possibilities" may be "necessary … in making determinations about domestic relations." *In re Custody of B.M.H.,* 179 Wn.2d 224, 238, 315 P.3d 470, 477 (2013). But to impose restrictions the court must have "substantial evidence" " 'that a danger of ... *damage* exists.' " *In re Marriage of Chandola*, 180 Wn.2d 632, 645, 327 P.3d 644, 651 (2014), *as*

corrected (Sept. 9, 2014) (emphasis included) (internal citations omitted). That is, the court can impose restrictions only after "identifying a specific, and fairly severe, harm to the child." *Id.,* at 647-648. Here, as this Court noted in the sentencing appeal, Lofgren acted with high concern for her children. CP 398-399. The fact of her conviction does not satisfy the proof requirement contemplated by the statute.

It does not minimize the seriousness of Lofgren's crime to acknowledge the complexity of families in general and this family in particular. From what the record reveals, both Lofgren and Hardin offer their children strengths and weaknesses, a fact even Lofgren's terrible mistake does not *per se* alter. We, as a society, have the wisdom to recognize a child's need for a parent, and a parent's need for and right to a relationship with a child, endure even when a parent makes a terrible mistake. Unfortunately, here, the trial court ignored that wisdom as it is embodied in our laws and policies.

Nor is this evident only in respect of the domestic violence limitation. Findings under RW 26.09.191(3)(g) also permit the court to "preclude or limit any provisions of the parenting plan…," but "only where necessary to 'protect the child from physical, mental, or emotional harm…'" *Chandola,* 180 Wn.2d at 648. And the limitations must have a nexus with the harm: must be based on particularized evidence of

"relatively severe physical, mental, or emotional harm to a child" and "must be reasonably calculated to prevent" such harm. *Chandola,* 180 Wn.2d at 636. Again, the court cannot substitute the fact of a parent's criminal conduct for this particularized evidence, especially when the children were "neither the direct victims of [Lofgren's] offense nor within the same class as Hardin, her victim." CP 398.

Finally, the court must also consider the parent's "liberty interest before effectively eliminating a parent's residential time with his or her children based solely on" the factors under this section. *Underwood,* 181 Wn. App. at 612. Obviously, many parents with statutory limitations enjoy residential time with their children, including incarcerated parents. Here, without implementing these safeguards, the trial court eliminated all contact between Lofgren and her children.

In short, it is in the interaction of the various statutory provisions that something went terribly wrong here. As noted in the opening brief, this proceeding operates under the modification provisions of the statute, meaning, in general, the petitioning parent bears the burden to prove a change in residential schedule serves the best interests. However, under RCW 26.09.191, to deny all contact between a parent and a child, the court must find specific harm and tailor any limitations to protect against such harms. The findings entered by agreement before the criminal appeal

do not suffice, even if they are given preclusive factual effect (See § III.D, below), nor does the passage of time alone. The court had little else by way of evidence: Hardin's enduring antipathy and the continued bias of the GAL. And, despite declaring the burden of proof fell entirely on Lofgren (obviously, it does not, as indicated above in terms of the nexus), the court deprived her of the witness she needed to speak to the specific circumstances and needs and best interests of children with incarcerated parents, including in particular this incarcerated parent and these particular children.

D. THE EFFECT OF THE AGREED PARENTING PLAN.

Hardin relies too much on the agreed parenting plan, failing ever to engage with the core problem – the truncated and biased inquiry that substituted for what our law requires and these children and this parent deserve. Numerous cases, from variable contexts, acknowledge precisely this, though Hardin mentions only one of them. Br. Respondent, at 15 (citing *In re Rankin,* 76 Wn.2d 533, 537, 458 P.2d 176 (1969)). In fact, where parties reach an agreement in an uncontested proceeding, this Court presumes "the court did not independently examine the evidence." *Schumacher v. Watson*, 100 Wn. App. 208, 213, 997 P.2d 399, 403 (2000). Consequently, the court dispenses with the usual requirement for a substantial change of circumstances as a prerequisite to modification.

Id. The proposition applies to custody disputes. *Timmons v. Timmons,* 94 Wn.2d 594, 617 P.2d 1032 (1980) (uncontested custody decree). That is, rules with preclusive effect do not apply to uncontested orders where "the critical issue is to determine custody in the best interests of the children." *In re Marriage of Akon*, 160 Wn. App. 48, 63, 248 P.3d 94, 101 (2011). Simply, the court cannot presume the original parenting plan protects the children's best interests. *Rankin,* 76 Wn.2d at 537 (internal citations omitted).

One way the court here gave preclusive effect to the agreed parenting plan is by finding Lofgren had not demonstrated a change of circumstances related to the basis for the limitations. CP 268. This finding ignores that the hotly disputed facts about these parties and their family life, on display in their dissolution pleadings, were never resolved in a fact-finding into particularized harm to the children from parental conduct. Whether these limitations are entitled to any effect, the court and Hardin treated them as the beginning and end of the inquiry and that is wrong. See, e.g., Br. Respondent, at 17-18 (presumption of parental conduct negated by "191" findings), 21 (conviction alone supports the "191" findings). The one undisputed fact is that Lofgren pled guilty to second-degree criminal solicitation. As suggested by the many pretrial disputes, this family has a complex history, and that history and the

relationships among all the parties are critical to understanding what contact these children should have with their mother – just as in any other parenting plan case. Whether the "191" findings stand or fall, the law still requires this inquiry. Certainly, that is what this Court assumed would occur when it terminated the no-contact order, not knowing the family law proceedings had concluded.[2]

In short, this case should be remanded for an actual trial on the merits, with a full inquiry into the children's best interests and with Lofgren enjoying a presumption of parental fitness entitling her to contact with her children, with such contact limited only to the extent proved by meeting the statutory requirements. *See, also, In re Custody of Z.C.,* 191 Wn. App. 674, 708, 366 P.3d 439, 449 (2015), *as amended* (Dec. 17, 2015) (modification of stipulated custody decree meant new trial with parental fitness presumed).

E. THE EFFECT OF THE RCW 26.09.187 ANALYSIS.

Hardin argues the court's use of RCW 26.09.187 factors benefitted Lofgren or was harmless. Br. Respondent, at 22-23. He claims as a benefit that a "187" analysis gives no weight to the existing parenting

[2] Hardin argues Lofgren should have gone to trial on the parenting plan, without explaining how that would have been anything other than a completely useless exercise given the sentencing order prohibiting all contact. Br. Respondent, at 18. It also ignores that in order for these parties to get divorced, they needed to enter final orders on all family law matters. RCW 26.09.050(1).

plan, but also points out the court did not really do a "187" analysis. As Lofgren previously observed, "187" applies only if RCW 26.09.191 is not dispositive. See Br. Appellant, at 31 n.11. In any case, it is hard to see how the "187" benefitted Lofgren or the children.

All Hardin needs here to concede is the unusual procedural posture of this case, a simple fact, and one that makes analogies to other cases (e.g., dependencies, terminations) not only helpful, but necessary, especially given the result the court reached. *See Underwood*, 181 Wn. App. at 612 (citing to dependency case in dissolution appeal where all contact with parent effectively eliminated). Certainly, the court's "187" analysis is not harmless to the extent it substituted for the necessary inquiry into the basis for limitations and how that evidence related to what limitations to impose – the "nexus" analysis. That is, even assuming "substantial evidence" of a basis for limitations, the court could only impose restrictions "reasonably calculated to prevent" the identified harm; otherwise it abuses its discretion. *Chandola*, 180 Wn.2d at 648.

This core inquiry exists whether the court analyzes under "187" or "191," and it is helpful to recall those cases where a court restricted a parent based on a fact with no proven nexus to harm or preventing harm. *In re Marriage of Black,* 92994-7, 2017 WL 1292014, at *11 (Wash. Apr. 6, 2017) (bias against parent permeated proceedings); *In re Marriage of*

Cabalquinto, 100 Wn.2d 325, 329, 669 P.2d 886 (1983) (trial judge based decision on "strong antipathy" to parent's sexual orientation); *In re Marriage of Wicklund*, 84 Wn. App.763, 770, 932 P.2d 652, 656 (1996) (restricting contact between father and his male partner). Thus, our law has always focused on the relationship between the parent and child, taking special care to avoid parenting decisions grounded in prejudice against certain parents.

Finally, Hardin argues the court under both "187" and "191" could consider the lack of contact between Lofgren and the children as a basis for restricting future contact because she caused the separation. See, e.g., Br. Respondent, at 23. Not quite right. Yes, Lofgren acknowledges responsibility for her criminal conduct. But she did not cause the sentencing judge to enter an erroneous no-contact order, which prohibited all contact from sentencing on January 24, 2013 (CP 17), a decision reversed on September 22, 2014 (mandate issued). Lofgren obtained a family law attorney and sought modification within three months of the mandate. As this Court has held, where limitations are imposed based on absence or impairment of emotional ties, there must be a finding the parent caused the absence or impairment. *Watson,* 132 Wn. App. at 233,) (internal citation omitted). Lofgren pled guilty rather than face a trial, presumably in part at least to shorten the separation from her children.

Again, the reality is more complicated than Hardin admits and certainly more complicated than the trial court was willing to address.

F. EXPERT WITNESS EXCLUSION AND IMPROPER APPOINTMENT OF GAL.

The court's failure to accommodate Lofgren's unexpected and critical problem with her expert witness dramatizes how little importance the court placed on actually probing the specific circumstances of this family. The court's order denying a continuance was an abuse of discretion, as argued in the opening brief. Hardin responds by misrepresenting the facts. He claims there was no evidence the expert was "unavailable to testify electronically." Br. Respondent, at 27. In fact, the witness made plain she was unavailable for any purpose other than to attend her critically ill family member. CP 187, 188; 189 ("As a result of the most recent devastation to my family, I am unable to work and will not be returning for the near future.") She could not testify "remotely," as Hardin claims. Br. Respondent, at 26. She could not testify at all.

Then Hardin claims Lofgren made a "tactical choice not to subpoena" her own expert witness. Br. Respondent, at 27. This assertion lacks any foundation in fact or logic. What possible advantage did Lofgren gain from the unavailability of her witness, on whom her case principally relied? Without repeating the argument from the opening brief, with the order denying Lofgren a continuance, the trial court

betrayed what had seemed true from the start, when the court granted adequate cause: a lack of interest in a searching and independent inquiry into the children's circumstances.

Hardin also has little to say about the improper appointment of the GAL. Br. Respondent, at 29-30. He urges the conservation of judicial resources as an adequate justification, but that ignores the countervailing need for neutrality. Lofgren and the GAL were at odds before the criminal conviction, which explains Lofgren's vigorous objection to the re-appointment of Kevetter. Plus, it hardly saves many resources when the GAL failed to do a thorough investigation in the first place. See Br. Appellant, at 9-14.

Finally, Hardin argues the court is not bound by the GAL's recommendation, as if that rendered this error harmless. Br. Respondent, at 30. The court here had little else to rely on, beyond the testimony of the parties, and did rely on the GAL. CP 262-263. In a way, Hardin may be right: getting this proceeding over rapidly was more important to the court than getting it done right.

G. COURT'S DELEGATION TO HARDIN AND CHILDREN.

It should not require a lot of authority to highlight how wrong it is to leave the victim of Lofgren's crime in charge of whether she and the children see one another, worse than delegating to a third party, which is

how Hardin tries to distinguish the authority Lofgren cites. Br. Respondent, at 31-32. At least the delegations in those cases were to neutrals (a GAL and an arbitrator). Hardin is not neutral; he opposes all contact. See, e.g., 1/11/16 RP 95. And those cases involving neutral decision-makers were faulted in no small part because there was no possibility of judicial review. See Br. Appellant, at 43 (cases cited therein). Here, the court awarded Hardin absolute veto power over all contact between Lofgren and the children. If nothing else, such an order makes no sense.

Likewise, to the extent the court's order allows the children to decide (and then tell their father), we know that a parent's liberty interest constrains such an order. *Underwood,* 181 Wn. App. at 612-613. Even where restrictions apply, the court must enter detailed findings to support such a scheme. Here, so few facts were in evidence, no such findings could be made. In any case, the court did not make them.

H. FEES IMPROPERLY AWARDED.

In defense of the court's improper award of fees, Hardin misquotes RCW 26.09.140 (Br. Respondent, at 33), which allows fees upon an analysis of the parties' respective financial circumstances. He also misrepresents that fees were incurred because Lofgren's expert chose to "abandon" her job. Id. Hardin does not and cannot point to where in the

record the parties submitted financial declarations or the court otherwise conducted a fact-finding on the parties' financial circumstances. Indeed, Hardin does not request fees on that basis in this proceeding.[3] The fee award has no basis in law or fact, as previously argued. Br. Appellant, at 44-45.

I. FEES IMPROPER ON APPEAL.

Hardin requests his fees claiming Lofgren's appeal is frivolous. Br. Respondent, at 34-35. An appeal is frivolous if there are no debatable issues upon which reasonable minds may differ and it is so devoid of merit that there is no possibility of reversal. *In re Marriage of Wagner,* 111 Wn. App. 9, 18, 44 P.3d 860 (2002). This appeal concerns the bond between a parent and her children. It is because that bond was treated as frivolous that this appeal has merit.

III. CONCLUSION

For the reasons stated above and in Appellant's Opening Brief, Karen Lofgren asks the trial court's orders be vacated and remanded for a new trial before a different judge. *See Marriage of Black,* 92994-7, 2017 WL 1292014, at *11 (Wash. Apr. 6, 2017) (new judge ordered where prejudice permeated proceedings). She also asks the court vacate the

[3] Hardin cites to a portion of RCW 26.09.140, but not to that portion relating to financial circumstances. Br. Respondent, at 34-35. And he argues only frivolousness as a basis for fees.

order awarding attorney fees and GAL fees and that Hardin's request for fees be denied.

Respectfully submitted this 3rd day of May 2017.

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RCW 26.09.187

Criteria for establishing permanent parenting plan.

(1) DISPUTE RESOLUTION PROCESS. The court shall not order a dispute resolution process, except court action, when it finds that any limiting factor under RCW 26.09.191 applies, or when it finds that either parent is unable to afford the cost of the proposed dispute resolution process. If a dispute resolution process is not precluded or limited, then in designating such a process the court shall consider all relevant factors, including:

(a) Differences between the parents that would substantially inhibit their effective participation in any designated process;

(b) The parents' wishes or agreements and, if the parents have entered into agreements, whether the agreements were made knowingly and voluntarily; and

(c) Differences in the parents' financial circumstances that may affect their ability to participate fully in a given dispute resolution process.

(2) ALLOCATION OF DECISION-MAKING AUTHORITY.

(a) AGREEMENTS BETWEEN THE PARTIES. The court shall approve agreements of the parties allocating decision-making authority, or specifying rules in the areas listed in RCW 26.09.184(5)(a), when it finds that:

(i) The agreement is consistent with any limitations on a parent's decision-making authority mandated by RCW 26.09.191; and

(ii) The agreement is knowing and voluntary.

(b) SOLE DECISION-MAKING AUTHORITY. The court shall order sole decision-making to one parent when it finds that:

(i) A limitation on the other parent's decision-making authority is mandated by RCW 26.09.191;

(ii) Both parents are opposed to mutual decision making;

(iii) One parent is opposed to mutual decision making, and such opposition is reasonable based on the criteria in (c) of this subsection.

(c) MUTUAL DECISION-MAKING AUTHORITY. Except as provided in (a) and (b) of this subsection, the court shall consider the following criteria in allocating decision-making authority:

(i) The existence of a limitation under RCW 26.09.191;

(ii) The history of participation of each parent in decision making in each of the areas in RCW 26.09.184(5)(a);

(iii) Whether the parents have a demonstrated ability and desire to cooperate with one another in decision making in each of the areas in RCW 26.09.184(5)(a); and

(iv) The parents' geographic proximity to one another, to the extent that it affects their ability to make timely mutual decisions.

(3) RESIDENTIAL PROVISIONS.

(a) The court shall make residential provisions for each child which encourage each parent to maintain a loving, stable, and nurturing relationship with the child, consistent with the child's developmental level and the family's social and economic circumstances. The child's residential schedule shall be consistent with RCW 26.09.191. Where the limitations of RCW 26.09.191 are not dispositive of the child's residential schedule, the court shall consider the following factors:

(i) The relative strength, nature, and stability of the child's relationship with each parent;

(ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;

(iii) Each parent's past and potential for future performance of parenting functions as defined in *RCW 26.09.004(3), including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;

(iv) The emotional needs and developmental level of the child;

(v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities;

(vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and

(vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.

Factor (i) shall be given the greatest weight.

(b) Where the limitations of RCW 26.09.191 are not dispositive, the court may order that a child frequently alternate his or her residence between the households of the parents for brief and substantially equal intervals of time if such provision is in the best interests of the child. In determining whether such an arrangement is in the best interests of the child, the court may consider the parties geographic proximity to the extent necessary to ensure the ability to share performance of the parenting functions.

(c) For any child, residential provisions may contain any reasonable terms or conditions that facilitate the orderly and meaningful exercise of residential time by a parent, including but not limited to requirements of reasonable notice when residential time will not occur.

RCW 26.09.191

Restrictions in temporary or permanent parenting plans.

(1) The permanent parenting plan shall not require mutual decision-making or designation of a dispute resolution process other than court action if it is found that a parent has engaged in any of the following conduct: (a) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions; (b) physical, sexual, or a pattern of emotional abuse of a child; or (c) a history

of acts of domestic violence as defined in *RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm.

(2)(a) The parent's residential time with the child shall be limited if it is found that the parent has engaged in any of the following conduct: (i) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions; (ii) physical, sexual, or a pattern of emotional abuse of a child; (iii) a history of acts of domestic violence as defined in *RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm; or (iv) the parent has been convicted as an adult of a sex offense under:

(A) RCW 9A.44.076 if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (d) of this subsection;

(B) RCW 9A.44.079 if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (d) of this subsection;

(C) RCW 9A.44.086 if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (d) of this subsection;

(D) RCW 9A.44.089;

(E) RCW 9A.44.093;

(F) RCW 9A.44.096;

(G) RCW 9A.64.020 (1) or (2) if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (d) of this subsection;

(H) Chapter 9.68A RCW;

(I) Any predecessor or antecedent statute for the offenses listed in (a)(iv)(A) through (H) of this subsection;

(J) Any statute from any other jurisdiction that describes an offense analogous to the offenses listed in (a)(iv)(A) through (H) of this subsection.

This subsection (2)(a) shall not apply when (c) or (d) of this subsection applies.

(b) The parent's residential time with the child shall be limited if it is found that the parent resides with a person who has engaged in any of the following conduct: (i) Physical, sexual, or a pattern of emotional abuse of a child; (ii) a history of acts of domestic violence as defined in *RCW 26.50.010(1) or an assault or sexual assault that causes grievous bodily harm or the fear of such harm; or (iii) the person has been convicted as an adult or as a juvenile has been adjudicated of a sex offense under:

(A) RCW 9A.44.076 if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (e) of this subsection;

(B) RCW 9A.44.079 if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (e) of this subsection;

(C) RCW 9A.44.086 if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (e) of this subsection;

(D) RCW 9A.44.089;

(E) RCW 9A.44.093;

(F) RCW 9A.44.096;

(G) RCW 9A.64.020 (1) or (2) if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (e) of this subsection;

(H) Chapter 9.68A RCW;

(I) Any predecessor or antecedent statute for the offenses listed in (b)(iii)(A) through (H) of this subsection;

(J) Any statute from any other jurisdiction that describes an offense analogous to the offenses listed in (b)(iii)(A) through (H) of this subsection.

This subsection (2)(b) shall not apply when (c) or (e) of this subsection applies.

(c) If a parent has been found to be a sexual predator under chapter 71.09 RCW or under an analogous statute of any other jurisdiction, the court shall restrain the parent from contact with a child that would otherwise be allowed under this chapter. If a parent resides with an adult or a juvenile who has been found to be a sexual predator under chapter 71.09 RCW or under an analogous statute of any other jurisdiction, the court shall restrain the parent from contact with the parent's child except contact that occurs outside that person's presence.

(d) There is a rebuttable presumption that a parent who has been convicted as an adult of a sex offense listed in (d)(i) through (ix) of this subsection poses a present danger to a child. Unless the parent rebuts this presumption, the court shall restrain the parent from contact with a child that would otherwise be allowed under this chapter:

(i) RCW 9A.64.020 (1) or (2), provided that the person convicted was at least five years older than the other person;

(ii) RCW 9A.44.073;

(iii) RCW 9A.44.076, provided that the person convicted was at least eight years older than the victim;

(iv) RCW 9A.44.079, provided that the person convicted was at least eight years older than the victim;

(v) RCW 9A.44.083;

(vi) RCW 9A.44.086, provided that the person convicted was at least eight years older than the victim;

(vii) RCW 9A.44.100;

(viii) Any predecessor or antecedent statute for the offenses listed in (d)(i) through (vii) of this subsection;

(ix) Any statute from any other jurisdiction that describes an offense analogous to the offenses listed in (d)(i) through (vii) of this subsection.

(e) There is a rebuttable presumption that a parent who resides with a person who, as an adult, has been convicted, or as a juvenile has been adjudicated, of the sex offenses listed in (e)(i) through (ix) of this subsection places a child at risk of abuse or harm when that parent exercises residential time in the presence of the convicted or adjudicated person. Unless the parent rebuts the presumption, the court shall restrain the parent from contact with the parent's child except for contact that occurs outside of the convicted or adjudicated person's presence:

(i) RCW 9A.64.020 (1) or (2), provided that the person convicted was at least five years older than the other person;

(ii) RCW 9A.44.073;

(iii) RCW 9A.44.076, provided that the person convicted was at least eight years older than the victim;

(iv) RCW 9A.44.079, provided that the person convicted was at least eight years older than the victim;

(v) RCW 9A.44.083;

(vi) RCW 9A.44.086, provided that the person convicted was at least eight years older than the victim;

(vii) RCW 9A.44.100;

(viii) Any predecessor or antecedent statute for the offenses listed in (e)(i) through (vii) of this subsection;

(ix) Any statute from any other jurisdiction that describes an offense analogous to the offenses listed in (e)(i) through (vii) of this subsection.

(f) The presumption established in (d) of this subsection may be rebutted only after a written finding that:

(i) If the child was not the victim of the sex offense committed by the parent requesting residential time, (A) contact between the child and the offending parent is appropriate and poses minimal risk to the child, and (B) the offending parent has successfully engaged in treatment for sex offenders or is engaged in and making progress in such treatment, if any was ordered by a court, and the treatment provider believes such contact is appropriate and poses minimal risk to the child; or

(ii) If the child was the victim of the sex offense committed by the parent requesting residential time, (A) contact between the child and the offending parent is appropriate and poses minimal risk to the child, (B) if the child is in or has been in therapy for victims of sexual abuse, the child's counselor believes such contact between the child and the offending parent is in the child's best interest, and (C) the offending parent has successfully engaged in treatment for sex offenders or is engaged in and making progress in such treatment, if any was ordered by a court, and the treatment provider believes such contact is appropriate and poses minimal risk to the child.

(g) The presumption established in (e) of this subsection may be rebutted only after a written finding that:

(i) If the child was not the victim of the sex offense committed by the person who is residing with the parent requesting residential time, (A) contact between the child and the parent residing with the convicted or adjudicated person is appropriate and that parent is able to protect the child in the presence of the convicted or adjudicated person, and (B) the convicted or adjudicated person has successfully engaged in treatment for sex offenders or is engaged in and making progress in such treatment, if any was ordered by a court, and the treatment provider believes such contact is appropriate and poses minimal risk to the child; or

(ii) If the child was the victim of the sex offense committed by the person who is residing with the parent requesting residential time, (A) contact between the child and the parent in the presence of the convicted or adjudicated person is appropriate and poses minimal risk to the child, (B) if the child is in or has been in therapy for victims of sexual abuse, the child's counselor believes such contact between the child and the parent residing with the convicted or adjudicated person in the presence of the convicted or adjudicated person is in the child's best interest, and (C) the convicted or adjudicated person has successfully engaged in treatment for sex offenders or is engaged in and making progress in such treatment, if any was ordered by a court, and the treatment provider believes contact between the parent and child in the presence of the convicted or adjudicated person is appropriate and poses minimal risk to the child.

(h) If the court finds that the parent has met the burden of rebutting the presumption under (f) of this subsection, the court may allow a parent who has been convicted as an adult of a sex offense listed in (d)(i) through (ix) of this subsection to have residential time with the child supervised by a neutral and independent adult and pursuant to an

adequate plan for supervision of such residential time. The court shall not approve of a supervisor for contact between the child and the parent unless the court finds, based on the evidence, that the supervisor is willing and capable of protecting the child from harm. The court shall revoke court approval of the supervisor upon finding, based on the evidence, that the supervisor has failed to protect the child or is no longer willing or capable of protecting the child.

(i) If the court finds that the parent has met the burden of rebutting the presumption under (g) of this subsection, the court may allow a parent residing with a person who has been adjudicated as a juvenile of a sex offense listed in (e)(i) through (ix) of this subsection to have residential time with the child in the presence of the person adjudicated as a juvenile, supervised by a neutral and independent adult and pursuant to an adequate plan for supervision of such residential time. The court shall not approve of a supervisor for contact between the child and the parent unless the court finds, based on the evidence, that the supervisor is willing and capable of protecting the child from harm. The court shall revoke court approval of the supervisor upon finding, based on the evidence, that the supervisor has failed to protect the child or is no longer willing or capable of protecting the child.

(j) If the court finds that the parent has met the burden of rebutting the presumption under (g) of this subsection, the court may allow a parent residing with a person who, as an adult, has been convicted of a sex offense listed in (e)(i) through (ix) of this subsection to have residential time with the child in the presence of the convicted person supervised by a neutral and independent adult and pursuant to an adequate plan for supervision of such residential time. The court shall not approve of a supervisor for contact between the child and the parent unless the court finds, based on the evidence, that the supervisor is willing and capable of protecting the child from harm. The court shall revoke court approval of the supervisor upon finding, based on the evidence, that the supervisor has failed to protect the child or is no longer willing or capable of protecting the child.

(k) A court shall not order unsupervised contact between the offending parent and a child of the offending parent who was sexually abused by that parent. A court may order unsupervised contact between the offending parent and a child who was not sexually abused by the parent after the presumption under (d) of this subsection has been rebutted and supervised residential time has occurred for at least two years with no further arrests or convictions of sex offenses involving children under chapter 9A.44 RCW, RCW 9A.64.020, or chapter 9.68A RCW and (i) the sex offense of the offending parent was not committed against a child of the offending parent, and (ii) the court finds that unsupervised contact between the child and the offending parent is appropriate and poses minimal risk to the child, after consideration of the testimony of a state-certified therapist, mental health counselor, or social worker with expertise in treating child sexual abuse victims who has supervised at least one period of residential time between the parent and the child, and after consideration of evidence of the offending parent's compliance with community supervision requirements, if any. If the offending parent was not ordered by a court to participate in treatment for sex offenders, then the parent shall obtain a psychosexual evaluation conducted by a certified sex offender treatment provider or a certified affiliate sex offender treatment provider indicating that the offender has the lowest likelihood of risk to reoffend before the court grants unsupervised contact between the parent and a child.

(l) A court may order unsupervised contact between the parent and a child which may occur in the presence of a juvenile adjudicated of a sex offense listed in (e)(i) through (ix) of this subsection who resides with the parent after the presumption under (e) of this subsection has been rebutted and supervised residential time has occurred for at least two years during which time the adjudicated juvenile has had no further arrests, adjudications, or convictions of sex offenses involving children under chapter 9A.44 RCW, RCW 9A.64.020, or chapter 9.68A RCW, and (i) the court finds that unsupervised contact between the child and the parent that may occur in the presence of the adjudicated juvenile is appropriate and poses minimal risk to the child, after consideration of the testimony of a state-certified therapist, mental health counselor, or social worker with expertise in treatment of child sexual abuse victims who has supervised at least one period of residential time between the parent and the child in the presence of the adjudicated juvenile, and after consideration of evidence of the adjudicated juvenile's compliance with community supervision or parole requirements, if any. If the adjudicated juvenile was not ordered by a court to participate in treatment for sex offenders, then the adjudicated juvenile shall obtain a psychosexual evaluation conducted by a certified sex offender treatment provider or a certified affiliate sex offender treatment provider indicating that the adjudicated juvenile has the lowest likelihood of risk to reoffend before the court grants unsupervised contact between the parent and a child which may occur in the presence of the adjudicated juvenile who is residing with the parent.

(m)(i) The limitations imposed by the court under (a) or (b) of this subsection shall be reasonably calculated to protect the child from the physical, sexual, or emotional abuse or harm that could result if the child has contact with the parent requesting residential time. The limitations shall also be reasonably calculated to provide for the safety of the parent who may be at risk of physical, sexual, or emotional abuse or harm that could result if the parent has contact with the parent requesting residential time. The limitations the court may impose include, but are not limited to: Supervised contact between the child and the parent or completion of relevant counseling or treatment. If the court expressly finds based on the evidence that limitations on the residential time with the child will not adequately protect the child from the harm or abuse that could result if the child has contact with the parent requesting residential time, the court shall restrain the parent requesting residential time from all contact with the child.

(ii) The court shall not enter an order under (a) of this subsection allowing a parent to have contact with a child if the parent has been found by clear and convincing evidence in a civil action or by a preponderance of the evidence in a dependency action to have sexually abused the child, except upon recommendation by an evaluator or therapist for the child that the child is ready for contact with the parent and will not be harmed by the contact. The court shall not enter an order allowing a parent to have contact with the child in the offender's presence if the parent resides with a person who has been found by clear and convincing evidence in a civil action or by a preponderance of the evidence in a dependency action to have sexually abused a child, unless the court finds that the parent accepts that the person engaged in the harmful conduct and the parent is willing to and capable of protecting the child from harm from the person.

(iii) If the court limits residential time under (a) or (b) of this subsection to require supervised contact between the child and the parent, the court shall not approve of a supervisor for contact between a child and a parent who has engaged in physical, sexual,

or a pattern of emotional abuse of the child unless the court finds based upon the evidence that the supervisor accepts that the harmful conduct occurred and is willing to and capable of protecting the child from harm. The court shall revoke court approval of the supervisor upon finding, based on the evidence, that the supervisor has failed to protect the child or is no longer willing to or capable of protecting the child.

(n) If the court expressly finds based on the evidence that contact between the parent and the child will not cause physical, sexual, or emotional abuse or harm to the child and that the probability that the parent's or other person's harmful or abusive conduct will recur is so remote that it would not be in the child's best interests to apply the limitations of (a), (b), and (m)(i) and (iii) of this subsection, or if the court expressly finds that the parent's conduct did not have an impact on the child, then the court need not apply the limitations of (a), (b), and (m)(i) and (iii) of this subsection. The weight given to the existence of a protection order issued under chapter 26.50 RCW as to domestic violence is within the discretion of the court. This subsection shall not apply when (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), and (m)(ii) of this subsection apply.

(3) A parent's involvement or conduct may have an adverse effect on the child's best interests, and the court may preclude or limit any provisions of the parenting plan, if any of the following factors exist:

(a) A parent's neglect or substantial nonperformance of parenting functions;

(b) A long-term emotional or physical impairment which interferes with the parent's performance of parenting functions as defined in RCW 26.09.004;

(c) A long-term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions;

(d) The absence or substantial impairment of emotional ties between the parent and the child;

(e) The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development;

(f) A parent has withheld from the other parent access to the child for a protracted period without good cause; or

(g) Such other factors or conduct as the court expressly finds adverse to the best interests of the child.

(4) In cases involving allegations of limiting factors under subsection (2)(a)(ii) and (iii) of this section, both parties shall be screened to determine the appropriateness of a comprehensive assessment regarding the impact of the limiting factor on the child and the parties.

(5) In entering a permanent parenting plan, the court shall not draw any presumptions from the provisions of the temporary parenting plan.

(6) In determining whether any of the conduct described in this section has occurred, the court shall apply the civil rules of evidence, proof, and procedure.

(7) For the purposes of this section:

(a) "A parent's child" means that parent's natural child, adopted child, or stepchild; and

(b) "Social worker" means a person with a master's or further advanced degree from a social work educational program accredited and approved as provided in RCW 18.320.010.

RCW 26.09.260 (in pertinent part)

(5) The court may order adjustments to the residential aspects of a parenting plan upon a showing of a substantial change in circumstances of either parent or of the child, and without consideration of the factors set forth in subsection (2) of this section, if the proposed modification is only a minor modification in the residential schedule that does not change the residence the child is scheduled to reside in the majority of the time and:

...

(c) Does not result in a schedule that exceeds ninety overnights per year in total, if the court finds that, at the time the petition for modification is filed, the decree of dissolution or parenting plan does not provide reasonable time with the parent with whom the child does not reside a majority of the time, and further, the court finds that it is in the best interests of the child to increase residential time with the parent in excess of the residential time period in (a) of this subsection. However, any motion under this subsection (5)(c) is subject to the factors established in subsection (2) of this section if the party bringing the petition has previously been granted a modification under this same subsection within twenty-four months of the current motion. Relief granted under this section shall not be the sole basis for adjusting or modifying child support.

...

(7) A parent with whom the child does not reside a majority of the time and whose residential time with the child is subject to limitations pursuant to RCW 26.09.191 (2) or (3) may not seek expansion of residential time under subsection (5)(c) of this section unless that parent demonstrates a substantial change in circumstances specifically related to the basis for the limitation.

...

(9) A parent with whom the child does not reside a majority of the time who is required by the existing parenting plan to complete evaluations, treatment, parenting, or other classes may not seek expansion of residential time under subsection (5)(c) of this section unless that parent has fully complied with such requirements.

(10) The court may order adjustments to any of the nonresidential aspects of a parenting plan upon a showing of a substantial change of circumstances of either parent or of a child, and the adjustment is in the best interest of the child. Adjustments ordered under this section may be made without consideration of the factors set forth in subsection (2) of this section.

ZARAGOZA NOVOTNY PLLC
May 03, 2017 - 3:53 PM
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Court of Appeals Case Number: 48987-2

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